IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.491 OF 1989

Shri Vasnat Laxman Pawar .. Appellant

Versus

1. Sonubai Tukaram More
   since deceased

2. Tarabai Shrirang Phadatare
3. Jai Ramchandra Pawar
4. Baban sakharam shirtavale .. Respondents

Mr.B.K.Raje for appellant

None for respndents

CORAM : P.V.KAKADE, J.

DATE : 14TH JULY 2005.

ORAL JUDGMENT :

1. This is an appeal preferred against the original defendants against the judgment and order passed by Addl. District Judge, Satara dated 21.7.1989 allowing the appeal holding that plaintiff nos.2, 3 and 4 were entitled to get possession of part of the property out of suit land and was further directed to make inquiry for mesne profit. By the said order the judgment and order passed by Civil Judge Senior Division, Satara dismissing the suit came to be set aside.

2. I have heard the learned counsel for the appellant. None appears for the respondents.

3. The plaintiffs came with the case that the suit property bearing Survey No.75/5-A of Mauje Banghar Taluka and District Satara admeasuring 89-R was exclusively owned by them and original Survey no.75 of the said village admeasuring three acres and 18 gunthas and it was owned by the father of the plaintiff Nos.1 and 2 viz. Kesu Zade. After the death of Kesu, the plaintiff nos. 1 to 3 and mother of the plaintiff no.4 started cultivation of the whole Survey No.75. After the death of Kesu, his brother’s daughter Rahi, wife of

Maruti Lotekar, filed a suit for partition bearing Civil Suit No.252 of 1956. It was decided on 25.6.1958 in favour of daughter Rahi and it was declared in that suit that Rahi was having one half share in the original Survey No.75. She filed an execution proceeding on the basis of the decree and she received actual possession of her one half share in original survey No.75 on 27.8.1963 under a separate possession receipt. The original Survey No.75 was divided into two parts at that time and were given to separate numbers i.e. Survey No.75/5-A and 75/5-B admeasuring 1 acre and 29 gunthas, respectively. Out of that Survey No.75/5B, which was handed over to Rahi, under possession receipt and remaining land i.e. Survey No.75/5-A remained with the plaintiffs and since then, they were in actual possession and cultivation of that land. The defendant's father Laxman Dhondi Pawar died about 15 years prior to the suit. On perusal of the mutation entries and record of rights of the suit property by the plaintiffs, they came to know that on 25.5.1957, they have executed an agreement of sale of Survey No.75/5A in favour of defendant's father Laxman Pawar. According to them, actually, they had never executed an agreement for sale of S.No.75/5A in favour of defendant's father and

nor had handed over possession to them at any time. According to the plaintiffs, by taking disadvantage of his name in the record of rights, the defendant was obstructing the peaceful possession of the plaintiffs to the suit property and hence the suit came to be filed. Alternatively, it was submitted that when it was found that the actual possession was with the defendant, the decree for possession was also claimed. According to the plaintiffs, the sale deed was not completed as per agreement of sale, and therefore, agreement of sale become automatically stands cancelled, and hence, they challenged the defendant's right whatsoever to remain in possession of the suit property. It was also submitted that the plaintiffs did not receive any consideration under the foot of the suit agreement, and therefore, it was not to be acted upon and no ownership title was transferred in favour of the defendant and on such and other grounds the suit came to be filed for the aforesaid reliefs.

. The defendant challenged the suit, inter alia, submitting that original Survey No.75/5 admeasuring three acres and 18 gunthas owned by Kesu and after his death, wife Gojabai inherited his property. Gojabai

died in the year 1953 after the death of Kesu, leaving behind him the plaintiff nos.1 to 3 and the mother of the plaintiff no.4 and daughter. Shevantabai is also dead. All the legal heirs of Shevantabai have not been made parties to the suit and therefore, the suit was challenged on the ground of non joinder of necessary party. It was further submitted that Kesu Zade died in 1949-50, two to three years prior to that, Kesu leased Survey No.75/5 to the defendant's father Laxman Pawar in the month of May 1946 as a tenant. While defendant's father was possessing the property as a tenant on 13.1.1956, the plaintiffs sold two acres of land out of S.No.75/5 to the defendant's father Laxman and he became exclusive owner of the two acres out of S.No.75/5 and enjoying the remaining land as a tenant. On 19.2.1957 Sonubai plaintiff No.1, Tanubai Plaintiff No.2, and the mother of the plaintiff no.4 Shevantabai executed an agreement of sale of whole of Survey No.75/5 in favour of the defendant's father by accepting amount of Rs.2700/=. Previously only two acres were sold under the sale deed but it was taken from Sonubai along with and after purchasing the whole of the property from all the shares, an agreement of sale was executed by them in favour of Laxman. At that time Jaibai was absent, but

she had consented to the said agreement of sale and therefore, by virtue of the agreement whole suit property had been in possession of the defendant as a tenant and it was confirmed as an owner. Before executing the sale deed, as per the agreement of sale, Rahibai filed Regular Civil Suit No.252 of 1956. In the said suit out of S.No.75/5 southern land of one acre and 29 gunthas was acquired by Rahibai by partition. That land was in possession of Rahibai. After the death of Kesu, the suit land did not go to the possession of the plaintiffs and they were not in enjoyment thereof. On the other hand in the year 1946 the whole of S.No.75/5 remained in possession of defendant as a tenant. In the year 1956 two acres of land was purchased by the defendant's father and in 1957 remaining land was agreed to be sold to him by the plaintiffs. In the year 1963 one half portion was given to Rahibai and the remaining portion was in actual possession of the defendant as an exclusive owner and the plaintiffs were in actual possession of that part of the land. The defendant's father was a tenant in possession since 1946 till 1957 and thereafter he enjoyed the exclusive ownership right. The defendant being the tenant in possession of the suit property, it was submitted that the civil court had no

jurisdiction to hand over its possession to the plaintiff. On such and other grounds the suit was sought to be dismissed.

4. The learned trial judge after hearing both the parties and on the basis of available evidence came to the conclusion that the plaintiffs did not prove that they were in possession of the suit property and alternatively also did not prove that they had ownership title to the property in question. Consequently it was held that the defendant had not obstructed the possession of the plaintiffs in the suit property. It was further held that the defendant had proved that he was in possession of the suit land in the part performance of the agreement of sale on payment of Rs.2700/= and it was also held that defendant has become owner by adverse possession of the suit property and as such suit for permanent injunction and alternatively for possession came to be dismissed. The appeal was carried to the District Court. The learned Addl.District Judge after hearing both the parties came to the conclusion that doctrine of part of performance contemplated under Section 53-A of the Transfer of Property Act was not applicable to the present dispute so far as land to the

extent of 60R out of the land adjoining the survey No.75/5-B was concerned and as such plaintiffs were held to be entitled for possession to the said part of the land and appeal was allowed to that extent. Hence the present appeal.

5. At the out set it may be noted that the appellate court while admitting the appeal framed substantial questions of law to the effect that whether the appellate court failed to consider that the agreement to sale dated 19th February 1957 was never terminated by respondents at any time and even till today same was subsisting. The question was further raised to the effect that whether the appreciation of the evidence on record was properly made by the lower court and in the light of certain documents before the court. In this regard I must note that besides this aspect, it is also to be considered whether the appellant-defendant is entitled to seek protection under Section 53A of the Transfer of Properties Act and as such whether his possession is protected by virtue of the said provision.

6. The learned counsel for the appellant took me

through the judgments of both the courts below as well as documentary and oral evidence on record. Perusal of the entire evidence shows that the plaintiffs in this suit have claimed permanent injunction against the defendant on the basis that the suit property Survey No.75/5-A admeasuring 87 R was owned and possessed by one Kesu Zade i.e. father of plaintiff nos.1, 2 and 3. He died in the year 1949-50. After his death, the plaintiff nos.1 to 3 and mother of the plaintiff no.4 succeeded the suit property. According to them, the cousin sister of the plaintiff no.2, Rahibai filed Regular Civil Suit No.252 of 1956, which was decreed in her favour in the year 1958, in which her one half share was decided in the suit property and she had obtained the possession thereof through court from the plaintiffs and remained in possession by filing execution proceeding on 27.8.1963. It is the case of the plaintiffs that Survey No.75/5A was given to their share and S.No.75/5B was given to the share of Rahibai under the possession receipt. Since then the suit property Survey No.75/5A is in their exclusive possession and in fact the defendant said to have obstructed their possession in the suit property. However, it is pertinent to note that on 25.6.1957 the plaintiff nos.1

to 3 and the mother of the plaintiff no.4 have executed an agreement of sale in favour of defendant's father Laxman Pawar of S.No.75/5-A and handed over possession of the property to him. The record also reveals that the crux of the dispute is with regard to the legal status of the impugned agreement. It is the case of the plaintiffs that since the agreement was not acted upon it came to an end automatically. On the other hand the defendant came with the case that the agreement is subsisting and possession handed over to him at the foot of the suit agreement, for which consideration was paid, is sufficient to protect his possession by virtue of Section 53-A of the Transfer of Properties Act. The evidence further showed that the possession of whole of S.No.75/5A is with the defendant. The plaintiffs in support of their case have examined plaintiff no.1 Exh.75, who has tried to support the plaintiffs case. However, it cannot be over looked that she had not led oral as well as documentary evidence to prove her title as well as possession over the suit property. On the other hand, if we peruse the documentary evidence on record, it is seen that 7/12 registered extract of the year 1976-77 of Sr.No.75/5A, which shows the name of Vasant Pawar, who is in possession of the suit property

and he is the owner thereof. The mutation extract produced at Exh.5 has clearly established that the defendant was in actual possession of the suit property so also Exh.6 clearly shows that S.No.75/5A was in actual possession of Laxman Pawar i.e. father of the defendant. The decree in Regular Civil Suit No.252 of 1956, which is at Exh.6 clearly shows that Rahibai had a share in the suit property. Not only this, but if we peruse the oral evidence of defendant's witness Shri Vasant and other witnesses, it is clear enough that the defendant was in actual possession of the suit property as a tenant in possession or purchaser of the suit property since prior to 1956. It is also significant to note that the oral evidence on behalf of the defendant is not shaken in the course of the cross examination. Moreover, they are seen to be only witnesses in respect of claim of possession of defendant in the suit property.

7. The agreement of sale of the year 1957 is also on record which shows that the plaintiff nos.1 to 3 had agreed to sell the whole of the suit property S.No.75/5 to Laxman Pawar on 19th February 1975 and handed over its possession to him on that day, 7x12 extract also

supported this aspect that Laxman Pawar was enjoying the suit property as exclusive owner in possession since the year 1958-59. Therefore, suffice it to say that the documents produced on record including three receipts are definitely in support of the defendant's contentions showing that he was in actual possession of the suit property by virtue of the agreement of sale. It is also to be noted that the agreement of sale is duly proved by the defendant's witness Chandoba Kadam at Exh.90 and contents are also proved through evidence of P.W.Gujar.

. On the basis of these aspects I am inclined to hold that the plaintiffs have failed to prove their exclusive title and actual possession over the suit property on the date of the suit or prior to that. It is also clear from the record that the defendant was in possession of the suit land since 19.2.1957 as a part performance of the agreement of sale and therefore, he is entitled for protection under Section 53-A of the Transfer of Property Act.

8. The learned lower appellate court judge, while partly allowing the appeal, has concluded that the

defendant is justified in taking the defence under Section 53-A of the Transfer of Property Act only to the extent of 17 Gunthas out of the suit property. However, in view of the circumstances noted above I prefer to disagree with the view taken by the lower appellate court and hold that the defendant is entitled to seek protection under the doctrine of part performance of the entire suit property and as such it must be held that the reasoning adopted by the lower appellate court is erroneous and therefore, has to be set aside.

9. In the result the appeal is allowed. The judgment and order passed by the learned Addl. District Judge, Satara is set aside and judgment and order passed by Civil Judge, Junior Division, Satara stands confirmed.

. In view of the peculiar facts and circumstances there is no order of costs.